ISSN 2950-6794 Vol. 3,No.1 February 2024

SPECIAL EDITION

KC

THE KING'S COUNSEL

MAGAZINE

The Hon. Barry Leon On Arbitration Law

The Spycatcher Trial Hon. Malcolm Turnbull AC

A Tribute to former Chief Justice of South Africa Pius N Langa

The Herostratos Syndrome

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EDITORIAL

We have featured The Honourable Barry Leon, Presiding Judge of the British Virgin Islands Commercial Court from 2015 to 2018, and now an arbitrator and mediator. Mr. Leon is experienced in litigating, arbitrating, and mediating many types of business and other disputes, from corporate, commercial, contract, shareholder, business breakup, and joint venture disputes, to employment, insurance, intellectual property, technology, expropriation, natural resources, and construction disputes. Mr. Leon, a Canadian, is the past Chair of the Arbitration Committee of ICC Canada, a Fellow of the Chartered Institute of Arbitrators (FCIArb), an International Mediation Institute (IMI) Certified Mediator, and a Fellow of the International Academy of Trial Lawyers. After receiving his law and MBA degrees, he practised dispute resolution in Canada and internationally as counsel in court and in arbitration for many years before becoming the Presiding Commercial Court Judge in BVI, and then an arbitrator and mediator, with chambers in Canada (Arbitration Place), London (33 Bedford Row) and the Caribbean (Caribbean Arbitrators).

Mr. Leon discussed with us his dispute resolution work, as well as the arbitration and mediation processes, and their respective advantages for the disputing parties. Also, he talked with us about the development and use of these dispute resolution processes, in particular in the Caribbean and in Canada. Mr. Leon stressed that arbitration is a process in which the parties are in control of almost all aspects of how their dispute will be resolved, from who is their decision-maker, to the applicable laws, rules, and procedures, and to the speed and cost of their arbitration. He stressed the advantages of having an arbitration award over a court judgment when it comes to cross-border enforcement.

Mr. Leon explained that mediation is assisted negotiation, where the disputing parties negotiate their own resolution of their dispute, with the help of a mediator. The mediator is not a decision-maker, and if the disputing parties cannot come to an agreement, one is not imposed upon them. He highlighted that the beauty of mediation is that the parties can be as creative as they can be in finding ways to resolve their dispute, and sometimes to re-establish a relationship. His interview is must reading for legal practitioners in the Caribbean, Canada, the U.K., throughout the Commonwealth, and beyond.

We believe a brief introduction to **'Canadian arbitration law and the reception of New York Convention'** will provide an insight into the dynamics of Canadian federal set up where provinces too have adopted arbitration legislation in conformity with the international requirements. This would be for the benefit of Non-Canadian legal practitioners on the dynamics of Canadian arbitration law.

Spycatcher litigation in Australia took the global media headlines by storm. It was a battle of wits between the finest Australian legal minds and the British Government. We have revisited the role played by Malcolm Turnbull (who later served as the Prime Miniser of Australia from 2015 – 2018) at the trial and the jurisprudence of the High Court of Australia on the applicability of foreign litigation in Australia.

We have paid a tribute to **former Chief Justice of South Africa Pius Nkonzo Langa**. He was appointed to the bench in 1994 by the former President Nelson Mandela and was elevated to the much exalted position as Chief Justice in 2005. He retired in October 2009. He also served a stint as the Chancellor of Nelson Mandela University.

We trust the February 2024 edition provides a rich glimpse of the issues that concern the legal profession in this era of globalization where trade and economic relations are conducted in conformity with the international laws and conventions.

Srinath Fernando
Editor / Publisher
February 2024

INTERVIEW

The Hon. Barry Leon

KC – The King's Counsel Magazine: The Honourable Barry Leon, FCIArb, MBA, LL.B., a Canadian, was Presiding Judge of the BVI Commercial Court from 2015 to 2018. Mr. Leon is an independent arbitrator, mediator, and dispute resolution specialist, primarily focusing on commercial disputes (including dispute avoidance).

He is an arbitrator and mediator with 33 Bedford Row Chambers in London, Arbitration Place in Canada, and Caribbean Arbitrators. Mr. Leon is a Fellow of the Chartered Institute of Arbitrators (FCIArb), an International Mediation Institute (IMI) Certified Mediator, and a Fellow of the International Academy of Trial Lawyers.

As the BVI Commercial Court's Presiding Judge, Mr. Leon presided over a range of high-stakes, complex international commercial disputes involving parties from around the world, including shareholder, joint venture and corporate disputes, insolvency matters, contractual disputes, fraud and asset recovery proceedings, judgment enforcement, and arbitration assistance and arbitral award enforcement. Prior to his judicial appointment, Mr. Leon was a Partner and Head of the International Arbitration Group at Perley-Robertson, Hill & McDougall LLP, a Canadian regional business law firm with a boutique international arbitration counsel practice, based in Ottawa, Canada. Until 2009 he was a Partner with Torys LLP, a leading Canadian business law firm, in its Litigation and Dispute Resolution Practice in Toronto, Canada, and for many years served as Coordinator of the Practice. Mr. Leon has more than 35 years of experience as counsel in litigation, arbitration, and mediation, acting on many complex and significant cases for a wide variety of clients and involving many different industries including financial services, natural resources, energy, insurance (property and casualty; life and disability) and reinsurance, air transportation, technology, intellectual property, manufacturing, and construction. His cases included corporate, joint venture and shareholder disputes; employment and labour; patent, trademark, and copyright; contractual and tort claims; insurance; and construction. Mr. Leon is an Arbitrator on the American Arbitration Association National Roster of Arbitrators, a member of the Cayman International Mediation & Arbitration Centre (CI-MAC)'s Rosters

of Arbitrators and Roster of Mediators, a member of the Jamaica International Arbitration Centre (JAIAC)'s Panel of Neutrals (Arbitration, Mediation, Facilitated Contract Re-Negotiation, Neutral Evaluation), a member of the Vancouver International Arbitration Centre (VanIAC)'s Domestic Arbitration, International Arbitration, and Mediation Panels, and a member of the roster mediators of Wyeth Thomas Mediation (in the UK).He is experienced in arbitrating and mediating corporate and commercial, contract, shareholder and business breakup, joint venture, business tort, employment, insurance, intellectual property, technology, expropriation, natural resources, and construction disputes. Mr. Leon has received numerous professional recognitions and accolades in international arbitration and related areas. In 2023, he was recognized with the "Award for Distinguished Service in Canadian Arbitration" by the Chartered Institute of Arbitrators (Ciarb), Canada Branch.

In 2022, Mr. Leon was shortlisted by Global Arbitration Review (GAR) for its award for the 'best prepared' arbitrator. Previously, Global Arbitration Review's GAR 100 called him "one of Canada's most high-profile arbitration practitioners," and Chambers Global referred to him as "an accommodating, instructive and personable practitioner who provides clear advice and opinions." In 2013 Mr. Leon received the "Award for Outstanding Contribution to Diversity in ADR" from the CPR International Institute for Conflict Prevention & Resolution (CPR). He is recognized annually by Chambers and by Who's Who Legal (WWL: Thought Leaders Arbitration in association with GAR). Other earlier recognitions include Global Arbitration Review's GAR 100; Chambers Global; Lexpert/American Lawyer's Guide to the Leading 500 Lawyers in Canada; PLC Which Lawyer?; The International Who's Who of Commercial Arbitration; The Best Lawyers in Canada; Canadian Legal Lexpert Directory; Guide to the World's Leading Experts in Commercial Arbitration; Guide to the Leading US/Canada Cross-Border Litigation Lawyers in Canada; and Who's Who Legal – Canada. Mr. Leon has held numerous positions in arbitration and other legal organizations, as well in other organizations. He is past Chair of the Arbitration Committee of the Canadian Chamber of Commerce, ICC Canada and he remains active on the Arbitration Committee of ICC Canada in various capacities, as well as being a member of the ICC's Commission on Arbitration and ADR.

He is Co-Chair of the Caribbean Task Force of the Institute for Transnational Arbitration's Americas Initiative; a member of the International Trust Arbitration Organisation's Research Council; a Director of the International Law Association's Canadian Branch; a member of the Organizing Executive Committee for Canadian Arbitration Week (CanArbWeek); and Co-Chair of the 2023 Canadian Arbitration Report.

Mr. Leon is a founding member of the BVI Arbitration Group, and of the governing Committee responsible for achieving the Group's objectives; a member of the Arbitration Act Review Committee of the Toronto Commercial Arbitration Society, which conducted a complete review of the Ontario, Canada domestic and international arbitration laws and proposed a Commercial Arbitration Act for the province; a moderator of OGEMID (part of TDM – Transnational Dispute Management), a global listserv focused on international arbitration, alternative dispute resolution and related fields. Also, he is a member of the International Trust Arbitration Organisation's Research Council; the

Board of Governors of the Canadian Guyanese Congress; the Advisory Board of the Canadian Association of Progressive Muslims; and the North America Committee of the Campaign for Greener Arbitrations (CGA), and was Organizing Committee Chair for the CGA global workshop, *"Shaping the Future of Greener Arbitration Conferences and Training"*.

Mr. Leon is Vice Chair and Branch Committee Member of the Caribbean Branch of the Chartered Institute of Arbitrators; an Executive Editor and a founder of the Canadian Journal of Commercial Arbitration; a member of the Board of Advisors of VISards, an India-based capacity building initiative for international arbitration mooting; and a member of the Canadian Bar Association's International Law Section, International Arbitration Club of New York, London Court of International Arbitration, American Society of International Law, Commonwealth Lawyers Association, International Bar Association, New York International Arbitration Center, Miami International Arbitration Society, and Toronto Commercial Arbitration Society, and The Advocates' Society. Mr. Leon was admitted to Bar in Ontario, Canada (now a non-practicing member of the Law Society of Ontario). He holds a law degree from the University of Toronto, an MBA degree from the Richard Ivey School of Business at Western University, and a BA (Political Science; Economics; English Literature) from the University of Alberta.

KC – The King's Counsel Magazine: Barry Leon, we are truly delighted to have an opportunity to conduct this interview with you. You have an impressive track record in arbitration as counsel and arbitrator, in mediation as counsel and mediator, in litigation as counsel in Canada for many years, and as the Presiding Judge of the Commercial Division of the Eastern Caribbean Supreme Court in the Territory of the Virgin Islands, more commonly known as the "BVI Commercial Court", from 2015 to 2018. We note that you have had broad exposure in litigation, arbitration, and mediation in various industries and in a wide range of types of disputes. Also, your record shows that you have handled many business disputes: corporate, commercial, contract, shareholder, business breakup, and joint venture disputes, as well as insolvency, employment, insurance, intellectual property, technology, expropriation, natural resources, and construction disputes.

The Hon. Barry Leon: Thank you so much for your kind words. It is a please to have the opportunity to speak with you.

KC – The King's Counsel Magazine: Having worked as counsel, arbitrator, judge, and mediator, do you have a preference? The roles are very different – yet at a high level, your role in all of them is to be involved in resolving disputes.

The Hon. Barry Leon: I really do not have a preference. I thoroughly enjoyed my work as counsel, both in arbitration and before courts, as well as in mediation of those disputes. And now I enjoy the work I am doing as arbitrator and mediator.

KC – The King's Counsel Magazine: What did you find most enjoyable in working as counsel?

The Hon. Barry Leon: The reasons that I enjoyed working as counsel include the strategy and tactics, the client relationship, the counsel teams, the different factual and legal issues, the energy and excitement of hearings and trials, and importantly, the opportunity to assist clients who have

wound up in a dispute and need a resolution in one way or another. That work is never boring, and I did not cut back on it because I did not enjoy it. I have had a few opportunities to keep my finger in that pie, as it were, in a few different ways, and I continue to enjoy doing so.

KC – The King's Counsel Magazine: What did you find most interesting as the Presiding Judge of the BVI Commercial Court?

The Hon. Barry Leon: Serving as the Presiding Judge of the BVI Commercial Court was extremely interesting – the Court handles many complex high-profile international corporate, shareholder, insolvency, arbitration, and other matters, including many applications to preserve assets pending the determination of the dispute, whether in court or arbitration, and whether in BVI or elsewhere. The advocates appearing before the Court are excellent, which was much appreciated. Now I am thoroughly enjoying working as an arbitrator and a mediator in Canada, the U.K., the U.S., the Caribbean, and numerous other parts of the world. The work is interesting and engaging in so many ways.

KC – The King's Counsel Magazine: And now?

The Hon. Barry Leon: Now my primary focuses are serving as an arbitrator and as a mediator. Those two roles are very different. As an arbitrator, you are the decision-maker, either alone or with two others. The work you do before, during and after a hearing is different than what you do as a mediator. As a mediator you are assisting the parties and their counsel to come to their own resolution of their disputes, often is ways that a court or arbitral tribunal could not impose, and sometimes in ways that enable parties to rebuild their relationship to their mutual advantage, as well as avoid the time, cost and stress of a hearing or trial.

KC – The King's Counsel Magazine: If I may ask what are the philosophical underpinnings of arbitration or the core values of arbitration?

The Hon. Barry Leon: Arbitration is a process in which the parties are in control of almost all aspects of how their dispute will be resolved. The expression that is commonly used in "party autonomy". Subject to only a few fundamental limitations, the parties can choose their decision-maker or decision-makers (one or three arbitrators), the law governing their arbitration, the rules and procedures under which their arbitration will be conducted, the speed and cost of their arbitration, and various other matters.

There are many reasons why almost all disputes are better handled in arbitration, whether internationally or within a single country. That is so whether the court system of the country or countries where the parties are based are trustworthy and honest, or otherwise. That is so because the parties are assured legally of an independent and impartial decision-maker, or more than one (commonly three) independent and impartial decision-makers, especially in larger disputes. Where the court system of one or both countries is not trustworthy, or if neither party wants the other to have "home court advantage", arbitration is the ideal answer. Importantly, arbitral awards to more easily enforced across borders than are court judgments overall. That remains a major advantage of arbitration.

KC – The King's Counsel Magazine: And what are the philosophical underpinnings of mediation or the core values of mediation?

The Hon. Barry Leon: Mediation is assisted negotiation. The disputing

parties (and their lawyers) negotiate their own resolution of their dispute, with the help of a mediator. The mediator is not a decision-maker, and if the disputing parties cannot come to an agreement, one is not imposed upon them.The beauty of mediation is that the parties can be creative in finding ways to resolve their dispute, and sometimes to re-establish a relationship. It is not uncommon for the disputing parties and their lawyers to go into a mediation thinking that there is no way they will settle. Yet in many of those cases – and to the surprise of the parties and their lawyers – they settle during the mediation process. They do so on a basis that for each of them is better than the alternative of carrying on with their dispute in arbitration or court, and after much expense, stress, and uncertainty, having a resolution imposed on them. Sometimes an imposed resolution is a resolution with which one party is happy, having regard to the time, cost and disruption of getting; other times, even the winning party is not particularly satisfied.

KC – The King's Counsel Magazine: If mediation is so sensible, are efforts being made to increase the use of mediation?

The Hon. Barry Leon: Until there is a "culture of mediation" in any jurisdiction, there will be some parties, and some counsel, who won't agree to mediate. Recent jurisprudential developments in England and Wales mean that judges will be able to require parties to mediate. Let me be clear. Not require them to settle but require them to engage in the process. In significant parts of Ontario, Canada, where I practised for most of my counsel career, there has been mandatory mediation for about two decades. Disputing parties must engage in a mediation process or they cannot get to trial. Overall, it works, and it works well. Of course, it took some time and some adjustments, but today there is a mediation culture among members of the commercial bar (and other bars). A mediation culture is developing in the Caribbean and other parts of the world but not as quickly as it should. We need to promote its benefits more – the lawyers, to business people, to other organisations, and to governments.

KC – The King's Counsel Magazine: What is the level of reception of arbitration in the Caribbean compared to pursuing disputes in courts?

The Hon. Barry Leon: Arbitration is a "work in progress" in the Caribbean. Of course, the Caribbean is not one but many jurisdictions which are at different stages of their development and their use of arbitration. Overall, Caribbean counsel continue to look to the courts as the forum for dispute resolution. And businesses are guided by their lawyers. Senior and mid-level legal practitioners in the Caribbean are comfortable with the rules and processes of courts, even if they find them less "fit for purposes" than they would prefer. None of us like change. We worry that we won't be able to handle a different forum, somewhat different rules and procedures, and so on, and that we may face new competition, or have reduced incomes. The reality is that good counsel readily adapt to arbitration's ways of doing things, they can compete effectively, and they wind up with satisfied clients and no overall negative consequences for their incomes. In Canada, there has been a sea change in the acceptance and use of arbitration. About a decade ago, if you walked into any law firm and asked the commercial (or various other) disputes practitioners "Who has an arbitration on the go?", the answer would have been only a few. Today, most counsel at all "ages and stages" would raise their hands.

The Caribbean is not there now but it is moving in that direction. I am

confident that the Caribbean will be in that situation in much less than a decade. And that will benefit the parties, and at a macro level, it will benefit justice in the Caribbean and the economic development of Caribbean countries. Having effective and efficient commercial dispute resolution facilitates trade and commerce, and spurs economic development. This is especially important for SMEs, which predominate in the Caribbean and elsewhere, and which cannot afford to have unresolved disputes and significant legal costs for dispute resolution.

KC – The King's Counsel Magazine: In particular, what is the standing of arbitration in BVI, where you are based in the Caribbean?

The Hon. Barry Leon: In BVI, where is am based in the Caribbean, there has been a noticeable uptake of arbitration by the leading commercial firms in recent years. They caught the play. They realize that developing a presence and profile in arbitration will position them to get the work as it develops, whether in arbitrations or in court proceedings relating to arbitration, such as enforcing arbitral awards, seeking court assistance for interim relief, seeking to set aside awards and so on.

KC – The King's Counsel Magazine: How important is the development of arbitration to the Caribbean?

The Hon. Barry Leon: I believe it is very important. As I mentioned earlier, developing the use of arbitration will benefit not only the efficient and effective resolution of commercial disputes but, in turn, the economies of Caribbean countries, by facilitating trade and commerce – nationally, regionally, and internationally.

KC – The King's Counsel Magazine: What initiatives are underway in the Caribbean to increase the awareness of, acceptance of, and use of arbitration, domestically, regionally, and internationally?

The Hon. Barry Leon: The Institute for Transnational Arbitration (ITA), part of an academic institution, published last year the *Final Report and Recommendations of the ITA Caribbean Task Force*, with recommendations on how the ITA can assist to develop and enhance arbitration in the Caribbean. I am a Co-Chair of the Task Force with Calvin Hamilton and with Theominique Nottage as Deputy Chair.

After broad consultation with a wide range of stakeholders throughout the Caribbean, we recommended in the Report five "initial ITA priorities in and for the Caribbean":

- Capacity building in arbitration among legal practitioners throughout the Caribbean.
- Raising the profile of Caribbean arbitration in the Americas.
- Judicial education and training in arbitration.
- Assisting legal educators in the Caribbean to provide arbitration education and training.
- Modernising arbitration laws in Caribbean countries that have not done so.

The report focuses on opportunities that exist as arbitration becomes more prominent in the region, and Caribbean arbitration practitioners become more active and prominent internationally. We explained in the Report: "... ITA desires to team up with Caribbean practitioners and organisations to support their initiatives, create opportunities and identify synergies. ... ITA is not looking to come to the Caribbean to tell people what to do or how to do it, but rather to support existing and new initiatives, and undertake initiatives (perhaps together with others) that

practitioners and others in the Caribbean would like to pursue. Finally, we worked to build an understanding of and support for the roles that the America's Initiative may be able to play in the development of arbitration in the Caribbean."

KC – The King's Counsel Magazine: The last recommendation concerns modernizing arbitration laws in Caribbean countries that have not done so. Where do Caribbean countries stand on that front?

The Hon. Barry Leon: Historically, arbitration laws in most Caribbean countries were based on English arbitration laws which England updated long ago. Those laws did not reflect the modern view that arbitration is an independent dispute resolution process that courts should support, and in which they should intervene minimally, and only on the limited grounds expressly specified. Bermuda modernised its arbitration law in 1993 but Caribbean jurisdictions continued with their old laws for almost another 15 years. Since then, one by one, Caribbean jurisdictions have been introducing modern arbitration laws – either for all arbitrations or for international arbitrations – largely based on a model arbitration law developed by the United Nations Commission on International Trade Law (UNCITRAL). The other Caribbean jurisdictions that have modernized their arbitration laws include Barbados, The Bahamas, BVI, Bermuda, Cayman Islands, Dominican Republic, and Jamaica. They have increased the awareness of arbitration and its importance and functioning, among disputes lawyers, transactional lawyers, and in-house lawyers, as well as businesspeople. CARICOM – the Caribbean Community and Common Market – with support from Canada's IMPACT Justice, developed a model arbitration law for the Caribbean based on the UNCITRAL Model Law. The CARICOM Model Bill, approved in mid-2021, was refined as the IMPACT Justice Model Arbitration Bill, 2022.

Trinidad and Tobago is modernising its law with the Arbitration Bill, 2023 that will come into force upon proclamation, and Guyana is moving in that direction with the IMPACT Justice Model Arbitration Bill, 2022.

As I mentioned earlier, one widely recognised advantage of arbitration is that arbitral awards are easier to enforce internationally than court judgments. Under the New York Convention (1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards), courts of contracting states must give effect to arbitration agreements, and they must recognise and enforce arbitration awards coming into their jurisdiction. Sixteen of the 172 contracting states are from the Caribbean, an increase from 10 in 2000. All Caribbean countries should join the New York Convention to attain the economic benefits of arbitration. That is part of what the ITA can assist them with.

KC – The King's Counsel Magazine: Why would parties want to choose the British Virgin Islands as the seat for their arbitration?

The Hon. Barry Leon: BVI has a modern arbitration law, as we talked about. We also talked about other jurisdictions with modern arbitration laws. But what BVI can provide more so than likely any other jurisdiction anywhere is confidentiality for arbitrations, and for those arbitrations if and when the court becomes involved, whether to assist the arbitration in terms of interim measures or gathering evidence, or when one of the parties seeks to set aside an arbitral award. The BVI arbitration law provides strict confidentiality, unless the parties agree otherwise, or the BVI court orders otherwise. This is supported by the

confidentiality of court proceedings in BVI generally. Parties would be hard pressed to be able to keep their disputes out of the public eye as well anywhere else. Parties desiring confidentiality should look hard at BVI as their seat.

KC – The King's Counsel Magazine: What is your take on the BVI International Arbitration Center?

The Hon. Barry Leon: The Centre, which opened after I moved to BVI, has modern, purpose-built hearing rooms in a modern building, with good quality technology and support services for arbitrations and mediations. From what I have seen, it is the finest of the centres in the Caribbean. The Cayman Islands opened a good hearing centre a little over a year ago, and in due course will expand it. A few other Caribbean jurisdictions have arbitral institutions but not the same calibre of hearing facilities.

KC – The King's Counsel Magazine: You are an arbitrator and mediator with 33 Bedford Row Chambers in London. What is your view of London as a centre of arbitration?

The Hon. Barry Leon: London is one of the main arbitration centres in the world. It has numerous advantages including the English arbitration law, the strong and large community of arbitration practitioners, the fact that many commercial transactions are under English law, a judiciary that understand and supports arbitration, a terrific arbitration hearing centre, a strong arbitration culture, and so on.

I enjoy the time I spend in London and engaging with the London arbitration community. I am grateful for opportunities to serve as an arbitrator in disputes that are London-based or handled by English solicitors and barristers. I have sat on arbitral tribunals with some terrific English arbitrators. While I am not an English lawyer, my time as the BVI Commercial Court Judge, and my Canadian legal background, means that often I am a suitable candidate for English law disputes.

KC – The King's Counsel Magazine: You are actively involved in arbitration in Canada, and as we noted earlier, a few months ago you were recognized with the "Award for Distinguished Service in Canadian Arbitration" by the Chartered Institute of Arbitrators (Ciarb), Canada Branch. What is your take on the arbitration in Canada? How is arbitration faring in Canada? And what about Canada as a seat and venue for arbitration?

The Hon. Barry Leon: As I told you earlier when we were talking about arbitration in the Caribbean, arbitration in Canada has come a long way in the past 10 – 15 years. All Canadian jurisdictions have Model Law arbitration statutes. They were among the first in the world to enact the Model Law. Canada being bilingual (English and French) and bi-juridical (common law and civil law) means Canadian lawyers are attuned to the international disputes world more than lawyers in many jurisdictions. The courts in Canada, from trial courts to provincial and territorial appellate courts to the Supreme Court of Canada are supportive of arbitration and understand it. Toronto has one of the finest arbitration hearing centres anywhere in world – Arbitration Place in the heart of downtown Toronto. Canada has strong international, national and regional arbitration organizations, and national arbitration institutions, most recently the Vancouver International Arbitration Centre (VanIAC).Toronto, Montreal, and Vancouver are well connected to most major centres in the world by direct flights, and the Eastern U.S. cities are a 60 – 90-minute flight from Toronto and Montreal. Canada has a strong and growing body of

arbitration counsel who are as capable as arbitration counsel anywhere, and it has a good number of experienced international arbitrators (as well as many experienced domestic arbitrators). Canada has produced several of the leading arbitrators in the world. Those choosing seats and venues for arbitrations should be giving more consideration to a Canadian seat and venue, particularly when they want to be somewhere other than in one of the parties' "home courts", where they want all of what Canada has to offer that I spoke about, and where the costs of conducting an arbitration are much more reasonable than in major arbitration centres.

The Canadian arbitration community continues to expand in numbers and activities. Canada's arbitration week, CanArbWeek, will have its fourth annual edition in Toronto at the beginning of June. Soon there will be a wealth of date of Canadian Arbitration in the Canadian Arbitration Report which gathered information through the Canadian Arbitration Survey (of which I am a Co-Chair with Prof. Janet Walker, and which is being conducted by FTI Consulting's survey team.

KC – The King's Counsel Magazine: Finally, would you like to share with our readers some of the interesting anecdotes that you had to encounter during your career as a lawyer, judge, arbitrator, or mediator? This need not be in arbitration you may have encountered some interesting episodes which could never forget. We would love to hear such stories?

The Hon. Barry Leon: I have been fortunate to have had some memorable experiences in my career up to now. One which ranks high on my "memory lane" is having acted as counsel for the Toronto Blue Jays Baseball Club in a lawsuit a few years after the team won back-to-back World Series. The damages issues revolved around how the team would have performed if it had not moved several years earlier from an old open-air stadium to what was then a modern covered dome stadium, at the time known as SkyDome. We had as our witnesses major figures from the Blue Jays, and I had the incredible experience of being tutored on the economics of baseball by the then-President of the Blue Jays, who is perhaps the naturally funniest person I have ever encountered. We designed a circular chart that showed the importance of a team's stadium (ballpark) to its success on the field and economically, demonstrating the interaction of having television revenues, high calibre players and so on.

KC – The King's Counsel Magazine: Any other interesting experiences that you can share with us.

The Hon. Barry Leon: Another memorable experience many years later was pursuing for a Middle Eastern client a former senior executive who had defrauded the company of a large sum of money and vanished. We wound up locating him in an unlikely location in Canada, freezing his assets, gather a lot of information to locate his assets, and bring proceedings not only in Canada but in a couple of Middle Eastern jurisdictions, one of which eventually jailed him for writing bad cheques. It gave me the interesting experience of being a witness in a court proceeding in Arabic in one of the Middle Eastern jurisdictions.

KC – The King's Counsel Magazine: We have time to ask you for one other interesting experience, if you would like to share another one.

The Hon. Barry Leon: This is not an anecdote or a single experience, but it is something that is an amalgam of experiences. In arbitration circles, one hears arbitrators talk from time to time about the occasion they sat with "an

arbitrator from Hell": someone on the tribunal who was difficult, uncooperative, lazy, disengaged, disruptive or worse. I am happy to report that I have never encountered anyone on a tribunal like that, whether I was chair of the tribunal or a co-arbitrator (and I sure hope I have never been one of those!). I have been fortunate to sit with people who were committed to the success of the arbitration and worked collaboratively with the other members of the tribunal. On all tribunals of which I have been a part, we enjoyed working with each other, and afterwards we enjoyed each other's company when we would meet at arbitration events or elsewhere. I believe that part of an arbitrator's duty on a three-member tribunal is to do everything in his or her power to make it work, even when – I would say, particularly when – there are differences of view on issues, as often there will be. Each member brings different thing to the table, and each has different strengths and weaknesses, different knowledge and experiences, so on. Once on a tribunal together, the members are a team, and owe it to the parties, and to arbitration as a process, to do their utmost to make it work process-wise.

KC – The King's Counsel Magazine: Thank you, Mr. Leon, for taking the time to speak with us, and for your insights and experiences.

The Hon. Barry Leon: My thanks to you for inviting me to speak with you, and for this opportunity to tell your readers a bit about myself.

"Arbitration is a process in which the parties are in control of almost all aspects of how their dispute will be resolved. The expression that is commonly used in "party autonomy"

Subject to only a few fundamental limitations, the parties can choose their decision-maker or decision-makers (one or three arbitrators), the law governing their arbitration, the rules and procedures under which their arbitration will be conducted, the speed and cost of their arbitration, and various other matters.

There are many reasons why almost all disputes are better handled in arbitration, whether internationally or within a single country. That is so whether the court system of the country or countries where the parties are based are trustworthy and honest, or otherwise. That is so because the parties are assured legally of an independent and impartial decision-maker, or more than one (commonly three) independent and impartial decision-makers, especially in larger disputes. Where the court system of one or both countries is not trustworthy, or if neither party wants the other to have "home court advantage", arbitration is the ideal answer. Importantly, arbitral awards to more easily enforced across borders than are court judgments overall. That remains a major advantage of arbitration".

COMMERCIAL ARBITRATION IN CANADA

Reception and adoption of the New York Convention

Canada recognizes the New York Convention (the Convention) which came within the realm of Canadian jurisprudence in 1986.. This has also been ratified by all the provinces of Canada. Some territories have enacted statutes in keeping with the full text of the Convention. However in the case of Québec where civil law jurisdiction is practiced, the Convention is implemented through the Code of Civil Procedure where there is a clear provision to extend primacy to the Convention into consideration when adjudicating arbitration in Canada. The arbitration law posits that the Convention does have an application to disputes arising out of legal relationships irrespective of the fact that contractual or not however it should be considered to be commercial under the laws of Canada, except for Québec where civil law is given preeminence.

In November 2013 Canada achieved a milestone by ratifying the ICSID Convention. This in effect will render an award as being binding. Canada is also a party to a number of bilateral investment treaties which includes regional free trade agreements. These agreements also provide procedure to ensure the recognition and enforcement of awards by arbitration tribunals. It also provides a mandatory requirement that the parties are deemed to be in compliance with this requirement if they are a party to the New York Convention

Canada created history by becoming the first country in the world to adopt the 1985 UNCITRAL Model Law, along with the Canadian Commercial Arbitration Act. This act applies to all commercial arbitrations and it has no restriction imposed on any specific Canadian institution but equally applies to both federal government and provincial institutions.

As far as Provincial application of the 1985 Model Law is concerned it has been implemented across Canada and implemented at the provincial level as well. There are variations in application of arbitration procedures in view of the federal political structure in Canada. As a result requirements for arbitration agreements differ from one provincial jurisdiction to the other and these variations are found in provincial legislation. In most provinces, the agreement must be in writing however there is a patent difference in Ontario where this is not required. The UNCITRAL Model Law stipulates that an arbitration agreement must be in writing in the form of a written contract signed by the parties, an exchange of letters (meeting of minds) as evinced by exchange of communications, correspondence, or electronic mail which provides evidence of an agreement in principal. Ontario Arbtration Act can be referred to on this cite: ; https://www.ontario.ca/laws/statute/91a17

Difederico v. Amazon.com, Inc., 2023 FCA 165

Boivin J.A

"The New York Convention was adopted by the United Nations in 1958 and came into force in June 1959. It was developed for the purpose of advancing the protections provided to arbitral awards under the Geneva Protocol of 1927. The overall objective of the New York Convention is to promote uniformity in the treatment of arbitration agreements and awards internationally. Initially, the New York Convention was meant to be limited to the recognition and enforcement of foreign arbitral awards to the exclusion of arbitration agreements (United Nations, UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 2016 ed., at 39; Gary B. Born, International Commercial Arbitration, 3rd ed., (Kluwer Law International, 2023), at 351). But in the final weeks, prior to the adoption of the New York Convention, its drafters decided to include a provision regarding the recognition and enforcement of arbitration agreements. This explains why Article I of the New York Convention, delineating the scope of its application, only refers to arbitral awards and not to arbitration agreements (New York Convention, Article I). In reality, the Convention applies to both. [30] Canada ratified the New York Convention nearly four decades ago, in 1986. There are currently 172 contracting state parties. By adhering to the New York Convention, these states have undertaken to give effect to arbitration agreements and to recognize and enforce awards made in other states, subject to certain limited exceptions. The New York Convention is described as setting a "ceiling" of control that contracting states may exert over international arbitral awards and arbitration agreements for purposes of ensuring their recognition and enforceability. It is credited for having created a uniform, simpler and therefore more effective regime for the resolution of international commercial disputes (Nigel Blackaby et al., Redfern and Hunter on International Arbitration, 7th ed., (Oxford University Press, 2022), at 26-27). [31] When Canada adopted and assented to the New York Convention in 1986 through the UNFAACA, it did so simultaneously with the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law through the Commercial Arbitration Act, R.S.C., 1985, c. 17 (2nd Supp.) (CAA). The Model Law was developed by the international community to provide a more detailed legal regime for arbitral proceedings in the spirit of the New York Convention in 1985. Together, these instruments form the cornerstones of the international commercial arbitration regime.

Given Canada's dualist federal-provincial process for international treaty implementation, various jurisdictions have taken different approaches to incorporating the New York Convention and the Model Law into domestic legislation. A number of provinces adopted both instruments together, resulting in single statutes, for example Ontario's International Commercial Arbitration Act, 2017, S.O. 2017, c. 2, Sch. 5 (ICAA). In contrast, the Federal Government chose to adopt the two instruments separately, specifically the New York Convention under the UNFAACA and the Model Law under the CAA. At the federal level, pursuant to subsection 5(2) of the CAA, the Model Law's application is limited to circumstances "where at least one of the parties to the arbitration is Her Majesty

in right of Canada, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters", whether international or purely domestic. As such, given that the claims at issue in the present case do not involve one of these parties or areas of law, only the UNFAACA is relevant for this case. (ii) The Competence-Competence Principle [33] Historically, courts in Canada were reluctant to give way to arbitration and more specifically to the competence-competence principle, which, as noted earlier, mandates that any challenge to an arbitrator's jurisdiction be decided by the arbitrator, not the courts. In essence, courts traditionally viewed the application of the competence-competence principle as favouring the autonomy of arbitration and thereby restricting their jurisdiction to judicially intervene in arbitration processes.

The adoption of the New York Convention through the UNFAACA and of the UNCITRAL Model Law through the CAA paved the path for Canada to curb the historical reluctance to recognize arbitration in favour of becoming an "arbitration friendly" country. Indeed, several provinces followed suit and the Supreme Court of Canada, through a series of seminal decisions, enshrined the acceptance and implementation of international law on arbitration and the competence-competence principle in particular throughout the country: Desputeaux v. Éditions Chouette (1987) inc., 2003 SCC 17, [2003] 1 S.C.R. 178 (Desputeaux); Seidel v. TELUS Communications Inc., 2011 SCC 15, [2011] 1 S.C.R. 531 (Seidel); Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, [2007] 2 S.C.R. 801 (Dell); TELUS Communications Inc. v. Wellman, 2019 SCC 19, [2019] 2 S.C.R. 144; Uber Technologies Inc. v. Heller, 2020 SCC 16, [2020] 2 S.C.R. 118 (Uber). [35] It is now well-established that Canadian courts will only consider challenges to the jurisdiction of an arbitrator or the enforceability of an arbitration agreement where such challenges raise a pure question of law or a question of fact or mixed fact and law that only requires a superficial consideration of the record (Dell at paras. 84-86). These questions may go to whether the arbitration agreement is null and void, inoperative, or incapable of being performed, as stated in Article II(3) of the New York Convention, or, since Uber, invalid for being unconscionable. As such, cases involving an arbitration agreement will be systematically referred to arbitration, subject to one of these limited exceptions"

Vento Motorcycles, Inc. v. United Mexican States, 2023 ONSC 5964

Vermetter J.
"The parties agree on the standard of review to be applied under Article 34(2)(a)(ii) of the Model Law. To justify setting aside an award under that provision for reasons of fairness or natural justice, the conduct of the Tribunal must be sufficiently serious to offend our most basic notions of morality and justice. Judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the arbitral tribunal's conduct is so serious that it cannot be condoned under Ontario law. See Consolidated Contractors at para. 65 and All Communications Network of Canada v.

Planet Energy Corp., 2023 ONCA 319 at paras. 42, 48.

Vento also made reference to the recent decision of the Judicial Committee of the Privy Council ("JCPC") in Gol Linhas Aereas SA v. MatlinPatterson Global Opportunities Partners (Cayman) II LP, [2002] UKPC 21 ("Gol Linhas"). This case relates to the enforcement of an arbitral award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention").[2] Article V(1)(b) of the New York Convention provides that recognition and enforcement of an award may be refused if the party against whom the award is invoked was "unable to present his case". This is the same language as in Article 34(2)(a)(ii) of the Model Law. The grounds for refusing recognition or enforcement of an international arbitral award under the New York Convention are substantially the same as the grounds to set aside such an award set out in Article 34 of the Model Law: see Costco Wholesale Corporation v. TicketOps Corporation, 2023 ONSC 573. The principles set out in Gol Linhas regarding what it means for a party to be "unable to present its case" are consistent with the principles set out by the Court of Appeal for Ontario. The JCPC stated that to justify the conclusion that a party was unable to present its case, what was required was not merely the adoption of a procedure that was irregular or undesirable, but proof of fundamental unfairness that went to the essence of the right to be heard: see Gol Linhas at para. 106. According to the JCPC, the applicable standard is one of due process capable of application to any international arbitration whatever the procedural law applicable and the nationality of the participants. This does not mean that the court should be seeking to identify the lowest common denominator of standards required by different national systems. Rather, the court should be seeking to identify and apply basic minimum requirements that would generally, even if not universally, be regarded throughout the international legal order as essential to a fair hearing. See Gol Linhas at para. 76. The JCPC expressed the view that where a sufficiently serious violation of due process was shown, there should not be an additional requirement of demonstrating a causal link between the violation and the decision of the arbitral tribunal because: (a) such an approach would dilute the right to a fair hearing; and (b) it would require the court to engage in an evaluation of the merits of the dispute which is contrary to the principle that this is exclusively the province of the arbitral tribunal. However, the JCPC stated that a court might properly exercise its discretion not to refuse enforcement if it was clear beyond doubt that the arbitral decision could not have been different had the violation not occurred.

A Tribute to former Chief Justice of South Africa Pius N Langa

The Separation of Powers
By Former Chief Justice of South Africa Pius N. Langa

The Union of South Africa, founded in 1910, was modeled on the Westminster system of government. There were two Houses of Parliament—the House of Assembly (Lower House) and the Senate (Upper House). The executive was responsible to and formed part of the legislature,1 while the judiciary occupied an independent position. I should mention here that the Executive was responsible for the appointment of judges. There was no provision for an independent body like the Judicial Service Commission as we have today. Until 1983, the structure of South African government closely resembled that of the United Kingdom, from which it had inherited most of its governmental institutions. Like the United Kingdom, the executive and the legislature were closely linked. The 1983 Constitution, however, brought some changes, one of which was in respect of the position of the President who, as head of state, ceased to be a member of parliament. The interdependence between Executive and the Legislature however continued.

Before I go too far, I should give an example of the tensions that sometimes characterize the relationship between the different arms of government, in particular between the judiciary on the one hand and the executive and the legislature on the other. They are nothing new and this happens in many countries with stable democracies. In 1951 the National Party government, keen to hasten its scheme to entrench grand apartheid and to disenfranchise the majority of citizens of this country, introduced a Bill in Parliament the purpose of which was to remove coloured voters from the common voter's roll. They ignored the fact that the change they sought required an amendment of entrenched provisions in the Constitution. The Bill they introduced was passed by a simple majority in the two houses of parliament, sitting separately. The validity of the new Act was challenged on the grounds that it had not been passed in conformity with the requirements for the amendment of [i]

1 * Chief Justice of the Republic of South Africa. A change however occurred when, in terms of the 'Tricameral Constitution' (Constitution of the Republic of South Africa

Act 110 of 1983) the State President ceased to be a member of the legislature. entrenched provisions of the South Africa Act. The Appellate Division [in Harris and Others v. Minister of Interior and Another2] held that the Act in question was invalid as it had not been passed in conformity with the special procedures.

What followed was the promulgation of a so-called High Court of Parliament Act [35 of 1952]. It was passed by a simple majority in both houses, sitting separately. The Act was designed to override the authority of the Appellate Court by establishing a body known as the 'High Court of Parliament;' which would consist of every member of the House of Assembly and of the Senate. The Act conferred on this body the power to review and set aside any past or future judgments of the Appellate Division in which that court had declared an Act of Parliament to be invalid. This hastily constituted High Court of Parliament was convened and in due course declared the Appellate Division decision in the Harris case invalid and upheld the validity of the Act that had been struck down by the Court. The Appellate Division however had the final laugh when the matter was brought to it. The offending Act was promptly struck down.3 The Court held firstly that the entrenched sections of the South Africa Act contained certain constitutional guarantees and that these guarantees would be worthless unless the courts enforced them,4 secondly that the 'High Court of Parliament' was not a true court of law but 'simply Parliament functioning under another name.'5 Two important landmarks were posted by this unwelcome excursion by the legislature into the judicial domain. First, that 'laws' which have not been passed according to the prescribed parliamentary procedures are not real laws and can be struck down, even where there is no meaningful judicial review. Second, that there indeed was an important distinction between the constitutional role of the legislature and that of the courts.

Separation of powers in modern-day South Africa

When the interim Constitution came into force in 1994, it reversed decades of colonial and apartheid policies of racial fragmentation and marked the beginning of a new legal order in South Africa. Whereas previously the combination of the Executive and parliament had exercised a virtual monopoly of power, this was replaced with a system where the Constitution became the supreme law of the land and any law or conduct inconsistent with it was invalid. Parliamentary supremacy had given constitutional form to a South African state characterized by inequality, racial discrimination and division. It gave way to the new constitutionalism which placed new values at centre stage. The core values became the achievement of equality, human dignity, the protection of human rights and freedoms, non-racism and non-sexism, a democratic system of governance and the rule of law. The separation of powers doctrine was employed to ensure that the new system of government contained within it the necessary 'checks and balances' to uphold the values which must now be part of our lives. The Constitution protects and promotes the system of separation of powers although it does not refer to it explicitly. In South African Association of Personal Injury Lawyers v Heath, the Constitutional Court held that there 'can be no doubt that our Constitution provides for such a separation [of powers] and that laws inconsistent with what the Constitution requires in that regard, are invalid.'6 Section 165 vests the judicial authority of the Republic in the Courts. Corresponding provisions vest the legislative and executive authority in Parliament and in the President as head of the National Executive, respectively. What is acknowledged is that the three branches of government perform separate functions. All three, separately, exercise governmental authority. The objective is to secure the freedom of every citizen by seeking to avoid an excessive concentration of power, which can lead to abuse, in one person or body.

The legislative branch cannot be responsible for the execution of the laws it makes, nor may it decide on the disputes such laws may provoke. In this arrangement, the role of an independent and impartial judiciary becomes critical. Without it, proper restraint on the unilateral exercise of governmental authority by the other two branches of government would be difficult indeed. Currently some interdependence among the branches of government can be seen from the following. In terms of section 89 of the Constitution, the President is elected by Parliament and is sworn in by the Chief Justice. He can be removed by parliament in cases of misconduct, inability or serious violation of the law. He in turn has a responsibility in relation to both the Judiciary and Parliament. He participates in the appointment of judicial officers, albeit with the interposition of the Judicial Service Commission, and it is his function to assent to bills from Parliament before they become law.

Separation of Powers Judicially Considered by the Constitutional Court

The Court has a primary role in safeguarding the rule of law and the supremacy of the Constitution. It performs its functions by considering the cases brought 6 South African Association of Personal Injury Lawyers v Heath 2001 (1) BCLR 77 (CC) at paras 18–22. Langa 30 before it where parties allege that other branches have acted contrary to one or more of the provisions of the Constitution. The attitude of the Court to the doctrine of separation of powers can therefore be best gleaned from the Court's judgments, a brief discussion of which follows. a First Certification Judgment As in many parliamentary systems, the most conspicuous element in South Africa is that members of the executive—the cabinet—are also members of parliament. This is one of the questions the Court had to decide, whether the Cabinet's concurrent membership in Parliament was consistent with the doctrine of separation of powers. The Court held that the system of the separation of powers is not a fixed or rigid constitutional doctrine. It is given expression in many different forms or made subject to checks and balances of many kinds. No system of separation of powers is perfect or absolute. Further, the Court held that the South African variant of the system in any event strengthened accountability of the executive arm of government to the legislative branch and therefore did not violate the doctrine. b The Executive Council of the Western Cape Legislature v President of RSA In Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others7 the majority of the Constitutional Court held that the 'manner and form' provisions of the Constitution prevent Parliament from delegating to the executive the power to amend the provisions of the enabling Act of Parliament; that sections 59, 60, and 61 of the Constitution are not merely directory, they prescribe how laws are to be made and changed and are part of the scheme which guarantees the participation of both Houses in the exercise of the legislative authority vested in Parliament under the Constitution.8 c Bernstein v Bester9 One of the findings of the Court in this case was that the right of access to courts was also important for the independence of the judiciary and therefore also as an aspect of the separation of powers principle. It was made clear that legislation that seeks to bring the judicial organs of State under the control of Parliament or the Executive could be struck down under the separation of powers doctrine even if that legislation did not conflict with any of the express provisions of the Constitution. Ackermann J stated that the provision of the interim Constitution which stated that: 7 Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others, 1995 (4) SA 877 (CC). 8 Op cit p 904–5, para 62. 9 1996 (2) SA 751 (CC). 31 The Separation of Powers '"[t]he Judiciary shall be independent, impartial and subject only to this Constitution and the law," has a clear purpose. It is to emphasize and protect

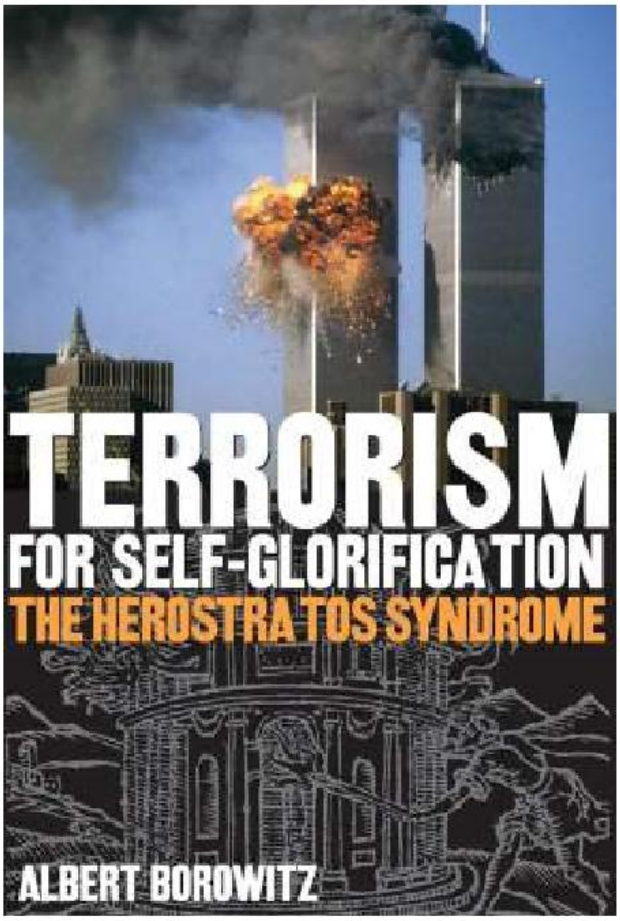
generally, but also specifically ... the separation of powers, particularly the separation of the judiciary from the other arms of the State. The sections achieve this by ensuring that the courts and other fora which settle justiciable disputes are independent and impartial. The provisions are fundamental to the upholding of the rule of law, the constitutional state, the "regstaatidee", for it prevents legislatures, at whatever level, from turning themselves by acts of legerdemain into "courts".'10 d De Lange v Smuts The Court held that the judicial function of committing an uncooperative witness to prison could not be exercised by organs of other branches of government, such as an insolvency investigator. e South African Association of Personal Injury Lawyers v Heath Certain legislation required the President to appoint a judge to head a Special Investigations Unit. The Court, however, held that certain of the functions of the head of the unit were executive in nature and inconsistent with the functions of a judicial officer. The Act was accordingly declared to be unconstitutional. f S v Dodo In that case, the applicants alleged that the legislator, by prescribing a minimum sentence in relevant legislation had encroached on the exclusive area of jurisdiction of the judicial arm of government. The Court held that such legislative provisions were in fact not unconstitutional because Parliament also had a responsibility with regard to sentencing. g In re: Constitutionality of the Mpumalanga Petitions Bill, 2000 The case dealt with the question whether the conferral on the speaker of a provincial legislature could confer on the speaker the power to make regulations and to determine the date a law comes into being. This was held not to be unconstitutional. The Court held that the powers in question did not violate the separation of powers. h United Democratic Movement (the UDM) and others v President of the Republic of South Africa and Others (Floor-crossing legislation). In this case, the Constitutional Court stressed that the merits or demerits of the disputed legislation are not the business of the Court decided is not whether the disputed provisions are appropriate or inappropriate, but whether they are not inconsistent with the Constitution. Also, amendments to the Constitution duly 10 Op cit para 105. Langa 32 passed in accordance with the requirements of the Constitution become part of the Constitution. There is little scope for challenging amendments passed in accordance with the prescribed procedures and majorities. (i) Certification of the Constitution of the Western Cape In Certification of the Constitution of Western Cape 1997, 11 the Constitutional Court while considering whether the provincial constitution passed by the provincial legislature had complied with section 143 of the national Constitution as was the requirement, stated that; the provinces remained creatures of the national Constitution and could not, through their provincial constitution making power, alter their character or their relation ship with other levels of government;12 stated that the doctrine of separation of powers is sufficiently broad to permit not only interdependence between the Executive and the Legislature but also strict independence as in the democracies of the United States of America, France and the Netherlands.13 j Other decisions Where the judicial and legislative functions seem to collide, our Courts have been careful not to encroach on functions of other branches of government. Academics have referred to the Court developing mechanisms of self restraint.14 In Soobramoney v Minister of Health, KwaZulu-Natal15 the Constitutional Court refrained from giving orders that the State should provide expensive dialysis treatment to keep a critically ill patient alive. In Ferreira v Levin NO it was noted that 'it is important that we bear in mind that there are functions that are properly the concern of the courts and others that are properly the concern of the legislature. At times these functions may overlap. But the terrains are in the main separate, and should be kept separate.'16 One of the oft-heard criticisms leveled at Courts concerns the relief given in matters involving socio-economic rights. Critics would contend that the Court should make more use of

structural interdicts or supervisory orders against the other branches of government. It does seem that where there is no evidence that the executive will not comply with an order of court, the courts are usually not enthusiastic about imposing such orders. 11 Speaker of the Western Cape Provincial Legislature, ex parte: In re Certification of the Constitution of the Western Cape, 1997 ; 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC). 12 Op cit para 8. 13 Op cit para 62. 14 I Currie & J de Waal The Bill of Rights Handbook 5ed (2005) 22. 15 Soobramoney v Minister Of Health, KwaZulu-Natal 1998 (1) SA 765 (CC). 16 Ferreira v Levin No and Others; Vryenhoek and Others v Powell No and Others 1996 (1) SA 984 (CC), per Chaskalson P at para183. 33 The Separation of Powers. Just to put everything in context, some comparisons with other countries may be useful. a United Kingdom The United Kingdom (UK) does not have a written constitution which would state the source of the authority of government. The doctrine of separation of powers in Britain is said to be applicable in only a limited sense.17 There is a considerable degree of overlap as far as the persons constituting government organs are concerned; the members of the cabinet are members of Parliament, the Law Lords sit in the House of Lords both as judges and as legislators, the Lord Chancellor is a cabinet Minister, is the head of the Judiciary and serves as a member of the House of Lords when it sits in its legislative capacity. Although a form of separation of powers is observed we find that the House of Lords is at the same time part of the legislative branch and the highest judicial body in the kingdom.18 In addition, the courts cannot invalidate laws of parliament. Parliament has ultimate authority over all affairs of government, including the monarch and the courts. Although this seems to be contrary to the concept of separation of powers, the fact is that there is a considerable amount of de facto independence among agents exercising various functions, and Parliament is constrained by various legal instruments, international treaties and constitutional conventions. b United States of America The United States system of government is arguably the strictest when it comes to separation of powers between the different branches of government.19The Congress, the federal legislature, is not linked in any way to the executive. The President heads the executive branch of government and has the power to veto bills approved by Congress. United States courts are responsible for the administration of justice and are vested with authority to invalidate any law promulgated by Congress if it conflicts with the United States Constitution. Nonetheless some interdependence exists to give effect to the system which is known for its 'checks and balances'. As a result the President, for example, makes bench appointments, albeit with the consent of Congress.20 17 Gretchen Carpenter, Introduction to South African Constitutional Law, 1987 Butterworths, at p 158. 18 Rautenbach IM and Malherbe EFJ (2004) Constitutional Law 4th ed. Durban: Lexis Nexis Butterworths at 79. 19 Ibid. 20 Op cit 80. Langa 34

Regulation of government authority is very important in any country. The need for independence of various branches of government is, however, the key to ensuring that they function properly. Fortunately, the rule of law and supremacy of the Constitution are usually entrusted to courts, which safeguard the equilibrium of the power play within the government itself. There is no doubt that the proper balancing of government power and the transparency this entails enhances the accountability of government and its three branches and accordingly contributes to the stability of government thus yielding direct economic benefits for the country.

Langa JP, 'The Separation of Powers' in Jonathan Klaaren (ed), *A Delicate Balance: The Place of the Judiciary in a Constitutional Democracy* (1st edn, SiberInk 2006) 27-34. With permission by
Prof. Jonathan Klaaren of the University of Witwatersrand, South Africa.

THE HEROSTRATOS SYNDROME
The story behind the maxim – *damnatio memoriae*



The history behind the Herostratos was an incident which took place during 4th Century BC in Greece. He was accused of having been an arsonist by destroying the Temple of Artemis in Ephesus which can be traced to the present day city of Selcuk in Turkey. This episode propelled him to the limelight and he became very notorious. His motive might have been to gain notoriety or he might have glorified himself for having committed such a crime. This incident gave way to adopting **damnatio memoriae** law in ancient Rome prohibiting anyone to refer to him either in writing or in public discourse. The history records that this dictate did not come to fruition and his name was called to mind whenever someone carries out a criminal act in order become famous. When Germany was under the Nazi's the dictator Adolf Hitler also made such a diktat - **damnatio memoriae -** he ordered the destruction of the publication **The Victory in Faith** authored by Ernst Rohm. Hitler had an abiding distrust for Rohm because he feared Rohm would mount a challenge to his authority.

A book by **Albert Borowitz** (1930 – 2023) titled **Terrorism For Self-Glorification: The Herostratos Syndrome** (True Crime History). This publication delves deep into the syndrome of Herostratos. He had referred to the crime in New York - the destruction of the Twin Towers or the 9/11 incident and the Taliban destruction of giant statue of Lord Buddha in Afghanistan and numerous other crimes committed solely for the purpose of gaining media coverage. He contributes a lot to the study of terrorism as it chronicles a unique set of circumstances in which perpetrators gained popularity in seconds with the advent of technology used by media institutions for the dissemination of news. This is a phenomenon that can have wider ramifications. The mass shooting incidents in the U.S and subsequent media coverage could provide a different perspective to a deviant mind to attempt at popularity or to become famous. The live transmission of Police car chase on the highway could turn a perpetrator to be a celebrity in American social milieu. There is a whole gamut of issues to be looked into within the

American society. This is can have awider impact on the political stability of the United States if this phenomenos is not arrested.

Professor Michale Blake argues that 'The function of the modern damnatio is to limit forever the stock of persons and ideas that can be put forward in a political community, by making certain persons and certain ideas damned and damnable. When international criminal law condemns criminals on this account, it does so not because the persons involved deserve to be punished—although, on the account I give here, they certainly do not deserve to be free from that punishment. Nor does it punish because such punishment will directly incentivize future would-be war criminals into rethinking their plans. International criminal law, on my account, is justified with reference to the future democratic deliberations of the political community that is to be constituted in part by the legal deliberations of that criminal tribunal. We punish, on this account, because punishment here communicates a message to future democratic participants, and that message is one of shame—of what should never again be spoken of as anything other than shameful'[ii]

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"Actus non facit reum nisi men sit rea" is a well-known maxim of natural justice which means a man can not be found guilty only on act but must be supported by his guilty intention. Finding the intention is not an easy task even for a well skilled trial lawyer. *Mens rea or* 'guilty mind', is the mental element that is necessary to establish a particular crime. In our common law legal system, the charge of an individual is predicated upon the mental condition. The reason why one would want to be famous by comiting a serious crimes is a matter that must be looked into as to the sociological upbring of the perpetrator. What really drove him to create such a situation. The roots of crimes are well grounded in the society in which one is brought up. Before laws are proposed the sociological element must be looked into. If the root cause is not eliminated the law cannot have any effect. Mens rea is first expounded in in **Sherras v. De Rutzen (1895) 1 QB 918**, at p 921, as follows:[iii]

"There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered."

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[1] * Chief Justice of the Republic of South Africa.
A change however occurred when, in terms of the 'Tricameral Constitution' (Constitution of the Republic of South Africa Act 110 of 1983) the State President ceased to be a member of the legislature.
2 1952 (2) SA 428 (AD).
3 Minister of Interior v Harris 1952 (4) SA 769 (A).
4 Op cit 779E–G (Centlivres CJ). 5 Op cit per Centlivres JA at 784D. 29
6 South African Association of Personal Injury Lawyers v Heath 2001 (1) BCLR 77 (CC) at paras 18–22.

7 Executive Council, Western Cape Legislature, and Others v President of the Republic of South Africa and Others, 1995 (4) SA 877 (CC). 8 Op cit p 904–5, para 62. 9 1996 (2) SA 751 (CC).
10 Op cit para 105
11 Speaker of the Western Cape Provincial Legislature, ex parte: In re Certification of the Constitution of the Western Cape, 1997 ; 1997 (4) SA 795 (CC), 1997 (9) BCLR 1167 (CC). 12 Op cit para 8. 13 Op cit para 62. 14 I Currie & J de Waal The Bill of Rights Handbook 5ed (2005) 22. 15 Soobramoney v Minister Of Health, KwaZulu-Natal 1998 (1) SA 765 (CC). 16 Ferreira v Levin No and Others; Vryenhoek and Others v Powell No and Others 1996 (1) SA 984 (CC), per Chaskalson P at para183.
17 Gretchen Carpenter, Introduction to South African Constitutional Law, 1987 Butterworths, at p 158.
18 Rautenbach IM and Malherbe EFJ (2004) Constitutional Law 4th ed. Durban: Lexis Nexis Butterworths at 79. 19 Ibid. 20 Op cit 80

[ii] Michael Blake 'Shame, Memory, and the Unspeakable: The International Criminal Court as Damnatio Memoriae' available at https://digital.sandiego.edu/cgi/viewcontent.cgi?article=1191&context=sdlr accessed 28 December 2023

[iii] Quoted by GIBBS C.J.: in He Kaw Teh v R [1985] HCA 43; (1985) 157 CLR 523 (11 July 1985) High Court of Australia.

The Spycatcher Trial : Advocacy skills
Hon. Malcolm Turnbull AC

The Attorney General of the United Kingdom commenced an action in the Supreme Court of New South Wales against the publication of the memoirs by an ex-intelligence officer Peter Wright. The then Prime Minister of UK Margaret Thatcher was adamant that this publication must be stopped at any cost. Peter Wright was equally tenacious and remained resolute to see that his book was published without any undue interference by the Thatcher Government. The Attorney General of UK sought an injunction to restrain the Australian publisher from publishing Peter Wright's memoirs - Spycatcher. The case was appealed to the Highest judicial authority in Australia the High Court. In his averments it was alleged that Peter Wright, in writing Spycatcher, had benefited from being an officer of the UK Spy agency and have had access to confidential knowledge and information which had been acquired by him whilst he was serving as an officer of the British Security Service. The Attorney General of UK claimed that British Government was entitled to the relief sought on the grounds that the purported publication of Spycatcher amounted to a gross transgression of fiduciary duty as he being an ex-intelligence officer is supposed to maintain the secrecy - an obligation he owed to the British Government. The publishers Heinemann Publishers Australia Pty Ltd rejected the notion that the purported publication entailed a breach of any obligation owed by Peter Wright to the British Government.

The Spycatcher cases in UK and Australia were considered as landmark decisions in the protection of freedom of speech and the right to publish in the UK, and had major implications for the political future of the Thatcher Government as to the way in which secret information were being handled by the British government

According the Powel J, the issues dealt with by the NSW Court was that issues reported in the book was quality of confidentiality and that the publication of what was considered intelligence materials would not cause any material harm to the United Kingdom Government or to its Security Service if they are placed in the public domain. The specific issues of concern for the Court were as follows

"(1) technology - mainly methods of

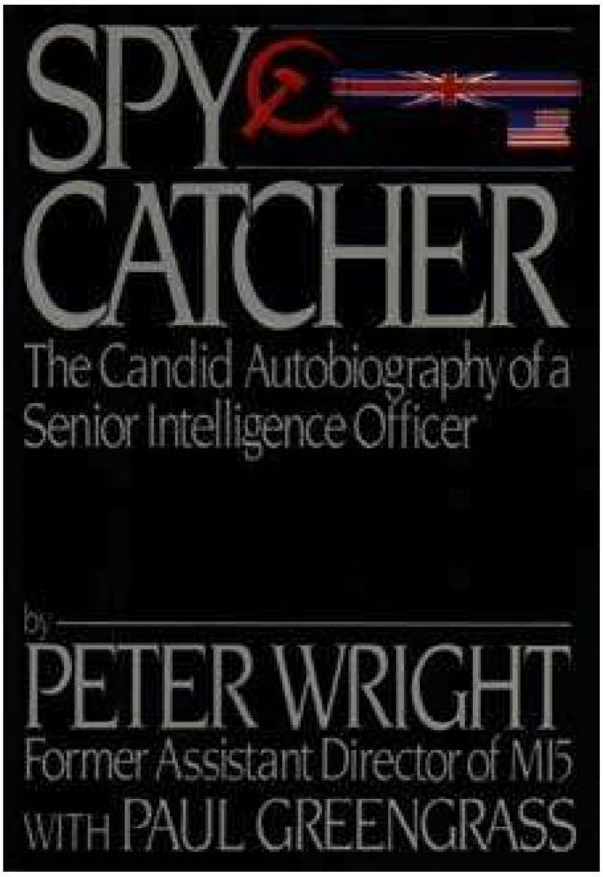
electronic surveillance and electronic methods of interception;
(2) operations concerning electronic surveillance and interception involving breaches of civil and international law;
(3) investigations into Soviet penetration of the Service before 1971;
(4) service as personal consultant to the Director General."

Malcolm Turnbull was a brilliant young lawyer who was only thirty-one years old and had been practicing law in Sydney Australia for five years. He read law at the University of Sydney graduating in 1977. His initial public activism was in journalism specializing in public affairs and politics. Turnbull says in his Memoirs that he had been reprimanded by the Chief Justice of Australia Sir Harry Gibbs for having referred to Judges in his political columns by their surnames which according the Chief Justice amounted to contempt of Court.
The key advocacy tactics of Turnbull was that Peter Wright had not been employed by the British Government on a contract at all. Any obligation he owed to the British Government would be similar to anyone who received any confidential information and he could not be stopped from being published any such information unless the materials Wright was going to place in the public domain were still confidential. It had no detrimental effect on the British Government. There was yet another contention that most of the information made public by Wright had already been circulated in the public domain through various other publications of similar nature hence there was no basis for the British Government's contention that publication of the book would cause damage to the British Government's clandestine activities. Turnbull argues that "since most of this material was at least twenty if not thirty years out of date there could be no damage done to the Government by that information being published". Turnbull argued that servants of the Crown derive their public trust from the Constitutional law context that is called Royal Prerogative and Turnbull posited that it was a "murky doctrine with its roots deep in the Middle Ages. Some of the terms of employment Wright did not even have the means to challenge the actions of the British Government even if he had been dismissed by a moment's notice. This was an interesting proposition that Wright's obligations were not governed by a specific contract and there were no remedies left in case he had been sacked. This proved that Wright's obligations toward the Crown – as sought by the British Government - was nonsensical. What Turnbull sought to drive at was that Wright had no other obligation expressly provided except the issue of 'confidence'. Turnbull was of the opinion that this was a show trial and the message was simply 'deterrent' to others who would wish to publish such books giving confidential information.
There were issues concerning public international law where a foreign country could not maintain a case against its own citizens in a different country as it would clearly clash with the jurisdiction. Jurisdiction in this case was that the British Government was trying to enforce its Official Secret Act against one of its citizens in Australia. This was seen as a breach of the sovereignty of another member of the United Nations. It was a clear manifestation of an affront to another sovereign state.

MASON C.J., WILSON, DEANE, DAWSON, TOOHEY AND GAUDRON JJ:

"No doubt an Australian court in appropriate circumstances will enforce an obligation of confidentiality on the part of a member of the Australian Security Intelligence Organization

(ASIO), that organization having been established for the purpose of protecting Australia's security. But even in such a case the court may be called upon to consider whether the Australian public interest in publication overrides the interest in preserving confidentiality: see The Commonwealth of Australia v. John Fairfax & Sons Ltd [1980] HCA 44; (1980) 147 CLR 39. Likewise, if an action to enforce an obligation of confidence owed by a member or former member of a foreign state's security service were to lie in the courts of this country, an Australian court could be called upon to determine whether the Australian public interest in disclosure of the relevant information required publication since the public interest in freedom of information and discussion is a material factor to be considered when a restraint on publication is sought. A question would then arise whether the Australian court should inquire into and determine what, if any, damage to the foreign state had been or would be caused by disclosure, including any detriment to its public interest. Such an inquiry might require an Australian court to resolve an issue which it could not appropriately entertain or competently determine, namely, what was, on balance, in the public interest of the foreign state. Moreover, if the Australian court were to decide that disclosure would be detrimental to the public interest of the foreign state but in the public interest of this country, the invidious task would remain of determining whether detriment to the foreign state should be given any, and if so what, weight against the local public interest. Even if one were to ignore questions of damage to, and the public interest of, the foreign state, the Australian court would be required to resolve the question whether the public interest of this country should prevail over the prima facie right of the foreign state to prevent disclosure. A situation in which an Australian court could be called upon to determine whether the prima facie rights of a foreign state should be overriden by a superior Australian public interest in disclosure would inevitably involve a real danger of embarrassment to Australia in its relationship with that state".[i]



[i] Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd ("Spycatcher case") [1988] HCA 25; (1988) 165 CLR 30; (1988) 78 ALR 449; (1988) 62 ALJR 344; (1988) 10 IPR 385 (2 June 1988) http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1988/25.html?stem=0&synonyms=0&query=%22SPYCATCHER%20%22

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KC - The King's Counsel Magazine
is a publication of the
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CITATION
KC - The Kg's Cnsl Vol. 3,
No. 1 February 2024

ISSN 2950-6794

9 772950 679001

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